Federal Court Cour fédérale

Date: 20120611

Docket: IMM-8579-11

Citation: 2012 FC 731

Toronto, Ontario, June 11, 2012

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

OLAWUNMI ISLAMIYAT RAJI AND MALIK AJIBOLA T. RAJI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The present Application concerns a decision of an Officer of Citizenship and Immigration Canada (Officer) refusing exemption from the in-Canada selection criteria for an application of permanent residence based on Humanitarian and Compassionate (H&C) or public policy considerations. The Applicant is a citizen of Nigeria who bases her application on risk upon return to Nigeria, her degree of establishment in Canada, and best interests of her children in Canada. The Applicant has two children in Canada: an 11 year-old son who is a citizen of Nigeria, and a 4 year-old Canadian born daughter.

[2] In conducting a best interests of the children analysis, the Officer made the following findings:

> […] I do not find that there are inadequate medical facilities in Nigeria to take care of her daughter's medical condition if she chooses to take her to Nigeria. I am not satisfied that the applicant's daughter would be subjected personally to a risk to her life if removed to Nigeria. I do not find the applicant's daughter will be at risk of death in Nigeria and find that the hardship of her return to Nigeria along with his [*sic*] mother to apply for a permanent residence visa unusual and undeserved or disproportionate.
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> […]
>
> […] I have considered that the daughter was born in Canada; however, I do not find that the general consequences of relocation and resettling back in Nigeria with her mother would have significant negative impact to her that would amount to unusual and undeserved or disproportionate hardship. […]
>
> I note the children are eleven and four years old respectively and while I am sympathetic to the emotional hardship that the eleven year old may experience due to his separation from his school friends, there is insufficient evidence before me that separation from his friends here in Canada would result in unusual and undeserved or disproportionate hardship. Whatever adjustments the children will have to make in Nigeria they will have the support of their mother who is the caregiver in their lives. I acknowledge that there will be some hardship for the children in returning and re-settling in Nigeria, however, I have been presented with insufficient evidence that the children will sever any bonds that have been established with either their friends or family and I am not satisfied that returning to Nigeria with their mother will deprive them of the basic necessities of life. Furthermore, I do not find the hardship of their return to Nigeria to obtain a permanent resident visa unusual and undeserved or disproportionate.
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> [Emphasis added]
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> (Decision, pp. 13 – 16)

Counsel for the Applicant argues that these findings were made in reviewable error based on the decision in *E.B. v Canada (MCI)*, 2011 FC 110 where Justice Mactavish makes the following statements at paragraphs 11 – 13:

> The first is the test or tests that the Officer appears to have used in assessing the children's best interests. At various points in the analysis the Officer discusses the best interests of the children in terms of whether the children would suffer "unusual and undeserved and disproportionate hardship" if they were required to return to Guyana. However, the unusual, undeserved, or disproportionate hardship test has no place in the best interests of the child analysis: see *Arulraj v. Canada (MCI)*, 2006 FC 529, [2006] F.C.J. No. 672 (QL) and *Hawthorne v. Canada (MCI),* 2002 FCA 475, 297 N.R. 187, at para. 9.
>
> I am mindful that the mere use of the words "unusual, undeserved or disproportionate hardship" in a 'best interests of the child' analysis does not automatically render an H&C decision unreasonable. It will be sufficient if it is clear from a reading of the decision as a whole that the Officer applied the correct test and conducted a proper analysis: *Segura v. Canada (MCI),* 2009 FC 894, [2009] F.C.J. No. 1116 (QL), at para. 29.
>
> It is not at all clear that the Officer applied the correct test in this case. In addition to the repeated use of the term "unusual and undeserved or disproportionate hardship" in the Officer's analysis of the best interests of the children, the Officer also looked at the situation of the children to see if they were in "an exceptional situation" or "unusual circumstance to justify a positive exemption". Neither of these tests is appropriate in a 'best interests of the child' analysis.

[3] The Applicant argues that the RPD's continual use of the term "unusual and undeserved or disproportionate hardship" made it integral to the H&C determination and trivialized the best interests analysis. I agree with this argument.

[4] In addition, the analysis provided by the Officer does not conform to what is, in my opinion, an "alert, alive and sensitive" consideration of the Applicant's two children (see *Kolosovs v Canada (MCI)*, 2008 FC 165, at paras. 9 – 12).

[5] For the reasons provided above I find that the decision was made in reviewable error.

ORDER

THIS COURT ORDERS that:

1. The decision presently under review is set aside, and the matter is referred back to a differently constituted panel for redetermination.

2. There is no question to certify.

"Douglas R. Campbell"
Judge

Federal Court Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8579-11
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